Supreme Court, U.S.
FILED

991 805 MAY 09 2000

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

City of New Orleans,

Petitioner,

vs.

United States of America,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert S. Abdalian
Counsel of Record
337 Metairie Road • Third Floor
Metairie, Louisiana 70005
Telephone (504) 862-6076
and
Daria Burgess Diaz
Osborne, McComiskey & Diaz
337 Metairie Road • Third Floor
Metairie, Louisiana 70005
Telephone (504) 837-3428
Attorneys for Petitioners
City of New Orleans

Mavis Early
City Attorney
1300 Perdido Room 5E03
New Orleans, LA 70112
(504) 565-6207

Curiam Publishing (504) 314-8777

Question Presented

Whether CERCLA permits the United States to obtain a court order commanding a property owner, the City of New Orleans, to grant the United States access upon the mere showing of a threat of a pollution release, or whether the United States must also establish that its demand is reasonable and is not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law—where:

- The City of New Orleans is one of hundreds of property owners on the Agriculture Street Landfill Superfund site.
- The response action the United States selected as appropriate for this Superfund site was denominated a "Voluntary Soil Removal Project."
- Numerous property owners at the removal site in addition to the City of New Orleans denied access and refused to allow the United States to implement the "Voluntary Soil Removal Project" on their contaminated property.
- The United States forced only the City of New Orleans among all the property owners to grant access and participate in the voluntary response action.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. This Case Involves Important, Recurring Questions Concerning Property Rights And the United States' Authority To Abridge Those Rights When Conducting a CERCLA Response Action. 4

CONCLUSION 7

APPENDIX A ..... Apx. 1

APPENDIX B ..... Apx. 2

APPENDIX C ..... Apx. 2

APPENDIX D ..... Apx. 14

TABLE OF AUTHORITIES

PAGE

CASES

United States v. City of New Orleans, 86 F. Supp. 2d 580 (E.D. La. 1999) 1

United States v. Mountaineer Refining Co., 886 F. Supp. 824, 827 (D. Wyo. 1995) 5

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 9601 ..... 2, 5

42 U.S.C. § 9604 ..... 2, 4, 6

28 U.S.C. § 1331 4

28 U.S.C. § 1292(a)(1) 4

IN THE
Supreme Court of the United States

City of New Orleans,

Petitioner,

vs.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is unpublished by order of the Fifth Circuit. It is reprinted in Appendix A (Apx.1). The citation of opinion issued in the United States District Court for the Eastern District of Louisiana is: *United States v. City of New Orleans*, 86 F. Supp. 2d 580 (E.D. La. 1999), reprinted in Appendix B (Apx. 2-13). The Unilateral Administrative Order for Access is unpublished, and is reprinted in Appendix C (Apx.14-27).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on February 9, 2000. This petition for writ of certiorari is filed within 90 days of the date on which the appellate court decision was entered. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 104(e)(5)(B)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (42 U.S.C. § 9601 *et seq.*) as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) ("CERCLA"), 42 U.S.C. § 9604(e)(5)(B)(i) provides:

(B) Compliance

The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

The City of New Orleans ("City") owns narrow strips of property on an undeveloped area of property that was formerly the Agriculture Street Landfill ("Site"). Much of the Site has been developed with private residences, a park, apartments, and a school. Designated as a Superfund site by the Environmental Protection Agency ("EPA") in December 1994, the Site was added to the National Priorities List ("NPL") maintained by the EPA pursuant to section 105(a) of CERCLA, making it a priority for investigation and response.

A Human Health Risk Assessment performed by the EPA revealed contaminants throughout the developed and undeveloped areas of the Site. Although some contaminants appeared in greater concentrations in the undeveloped areas, the EPA also found high concentrations of contaminants throughout the developed portions of the Site.

After studying and investigating conditions at the Site, the EPA selected a "Voluntary Soil Removal Project" as the appropriate response action. The documentation disseminated to property owners at the Site and the regulatory record compiled by the EPA emphasized that participation in the selected response action was purely voluntary.

When the City declined the EPA's invitation to participate in the Voluntary Soil Removal Project, the United States issued a Unilateral Administrative Access Order ("UAO") to the City dated February 24, 1999. (Apx. 14-27.) On March 19, 1999, the United States filed a complaint seeking court ordered enforcement of the UAO and immediate access to the City's property to perform the response action. Although a number of property owners on the developed portion of the Site also had refused the EPA access, the United States did not transform the "voluntary" response action into an involuntary response action for any nonparticipating property owner, except the City.

On April 1, 1999, the district court granted the United States' Motion for Order in Aid of Immediate Access. The City opposed the motion, maintaining that the demand for access was arbitrary and capricious and an abuse of discretion because the EPA had characterized and implemented the response action as voluntary. The City pointed to the absence of record support for the EPA's action in forcing the City, alone, to grant access and participate in the response action

against its will. The district court ruled, however, that the United States had satisfied the requirements of 42 U.S.C. § 9604 (e)(5)(B)(i). (Apx. 10-12.) The court found the EPA's representation to property owners at the Site that their decision to grant access was voluntary, did not renounce EPA's enforcement authority, and the EPA therefore retained the option of filing an enforcement action under § 9604(e) (5) against a property owner who refused access. (Apx. 10, f.n. 8.)

The City appealed the district court's decision to the Fifth Circuit. On February 9, 2000, the Fifth Circuit affirmed the district court's decision and found that the district court did not err in ordering the City to grant the EPA access to its property at the Site. (Apx. 1.)

The jurisdiction of the district court was invoked under 42 U.S.C. §§ 9604 and 9613(b), and 28 U.S.C. §§ 1331 and 1345. Appellate jurisdiction was invoked under 28 U.S.C. § 1292(a)(1), which vests in the courts of appeals, jurisdiction of appeals from interlocutory orders of the district courts of the United States granting injunctions.

REASONS FOR GRANTING THE WRIT

I. This Case Involves Important, Recurring Questions Concerning Property Rights And the United States' Authority To Abridge Those Rights When Conducting A CERCLA Response Action.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), § 9604 (e)(5)(B), protects property owners from unreasonable government intrusions by prohibiting the United States from obtaining court ordered

access to private property unless it satisfies the following five prerequisites: "1) the entry must be sought under paragraphs (2), (3), or (4) of § 9604 (e); 2) the EPA must seek the property owner's consent before seeking court-ordered compliance; 3) the EPA must demonstrate that there is a 'reasonable basis to believe' that there may be a release of a hazardous substance, pollutant, or contaminant from the site; 4) there must be some interference with the entry request before the court may order compliance; and 5) the demand for entry must not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law." (Apx. 6.); *United States v. Mountaineer Refining Co.*, 886 F. Supp. 824, 827 (D. Wyo. 1995). The primary issue raised by the City was the unreasonable and arbitrary action of the United States in forcing the City's participation in the "voluntary" response action selected by the EPA for the Site.

The minimal threshold requirement for obtaining access is "a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." 42 U.S.C. § 9604 (e)(5)(B). When property is located on an existing Superfund site, the minimal threshold standard will necessarily be satisfied, and, therefore, the City did not challenge the United States' demand for access on this ground. Upon satisfying the minimal threshold requirement, the United States must next establish that its demand for entry or inspection is not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C. § 9604 (e)(5)(B)(i).

The district court granted, and the Fifth Circuit affirmed, the United States' motion for order in aid of immediate access, finding that because the EPA had a reasonable belief that there may be a release or threat of a release of hazardous

substances from the Site, its demand for access to the City's property was not arbitrary and capricious. (Apx. 11.) The court's ultimate holding contradicted its initial findings and the plain language of CERCLA § 9604 (e)(5)(B)—the release or threat of a release and the arbitrary and capricious standard are two separate requirements, both of which the United States must satisfy to obtain court ordered access. (Apx. 6.) By treating the threshold showing and the arbitrary and capricious requirement as one in the same, the Fifth Circuit has created a legally insupportable standard that violates the requirements and protections of CERCLA and facilitates unreasonable governmental interference with private property rights.

These issues impacting fundamental property interests are significant and are certain to arise in the future. The importance of this case and the fact that these issues likely will recur is evidenced by the United States' letter to the district court requesting publication of the opinion. (Appendix D, Apx. 28.) Indeed, as of April 24, 2000, there are 1,220 sites on the NPL. If the applicable standard for obtaining judicially ordered access to private property under CERCLA is merely the threshold showing that the government has a reasonable basis to believe there may be a release of a hazardous substance or pollutant, there will be virtually no set of circumstances under which access to private property on or near a Superfund site can be denied by a court, even where, as was the situation in this case, the request for access is unreasonable and not supported by the regulatory record. The decision in this case eviscerates CERCLA's minimal protections against unreasonable, arbitrary governmental intrusion onto private property. Review by this Court is necessary to correct this blatant misapplication of the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

Robert S. Abdalian
Counsel of Record
337 Metairie Road • Third Floor
Metairie, Louisiana 70005
Telephone (504) 862-6076
and
Daria Burgess Diaz
Osborne, McComiskey & Diaz
337 Metairie Road • Third Floor
Metairie, Louisiana 70005
Telephone (504) 837-3428
Attorneys for Petitioners
City of New Orleans

Mavis Early
City Attorney
1300 Perdido Room 5E03
New Orleans, LA 70112
(504) 565-6207

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-30341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

CITY OF NEW ORLEANS

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(99-CV-893-E)

Before POLITZ and DAVIS, Circuit Judges, and RESTANI,* Judge.

PER CURIAM: **

After reviewing the record and considering the briefs and arguments of the parties, and essentially for the reasons stated by the district court in its April 1, 1999 order, we are persuaded that the district court did not err in entering its order directing the City to permit the EPA to have access to the City property.

AFFIRMED.

* Judge, U.S. Court of International Trade, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

versus

CITY OF NEW ORLEANS

CIVIL ACTION NO. 99-0893
SECTION: E/1

[86 F. Supp. 2d 580; 1999 U.S. Dist. LEXIS 4397; 48 ERC (BNA) 1970]

April 1, 1999, Decided
April 1, 1999, Filed; April 1, 1999, Entered

RULING ON MOTION AND ORDER

Before the Court is the Motion of the United States Environmental Protection Agency ("EPA"), for an Order in Aid of Immediate Access. The EPA seeks enforcement of a Unilateral Administrative Order ("UAO") issued by the EPA, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601,

et seq. ("CERCLA"). Defendant, City of New Orleans ("City"), opposes the motion.[1]

Factual Background

The City owns some undeveloped property in the area of the Agriculture Street Landfill Superfund Site (the "Site"). The Site, which was a municipal waste landfill, is located in New Orleans, Louisiana.

In September 1997, after the EPA had already conducted numerous investigations and remedial actions at different areas of the Site,[2] the EPA authorized a "non-time critical removal action" on three of the five delineated sections of the Site, which included the property owned by the City. The "non-time critical removal action" involved excavation and removal of contaminated soil and the placement of two feet of clean soil on the developed portions of the Site, and the removal of vegetation, grading the soil, and the placement of one foot of soil on the undeveloped part of the Site, including the City's property.

On November 12, 1997, the EPA provided a copy of an "access agreement" to the City so that the EPA could obtain access to the City's property in order to undertake these clean-up actions. The City did not respond. On October 19, 1998, the EPA met with the City to discuss whether the City would

---

[1] In the collateral proceedings, Civil Action No. 99-0756, the City brought a complaint for a preliminary and permanent injunction to enjoin the EPA from obtaining access to the City's property at the Agriculture Street Site. A temporary restraining order was previously granted by the Court on March 8, 1999. However, the Court dismissed the City's action because the Court did not have subject matter jurisdiction.

[2] The City has never opposed any of the response/remedial actions taken by the EPA until the September 1997 action.

allow the EPA to conduct the "response" actions. On November 19, 1998, the EPA again discussed the issue with the city and sent another "access agreement". Again, the City did not respond. On December 23, 1998, the EPA again wrote the City and requested access, noting that it had "statutory authority to secure access where entry is needed to effectuate a response action" under CERCLA. On January 7, 1999, the City unequivocally denied access to the EPA via letter. On February 24, 1999, EPA sent the UAO ordering that the City allow the EPA and its assigns access to the City's property. The UAO, also ordered the City to notify the EPA whether it would comply by March 8, 1999. The City did not respond, and instead filed the complaint for a preliminary and permanent injunction to enjoin defendants from implementing continuing response efforts on the City's property at the Site. This Court granted a temporary restraining order on March 8, 1999, but subsequently dismissed the City's action concluding that it did not have subject matter jurisdiction.

Law and Analysis

Under 42 U.S.C. § 9604(e)(5), this Court has jurisdiction to compel a party to allow the EPA to have access to their property. Consequently, this Court clearly has jurisdiction over the instant case as well as the EPA's Motion for Order in Aid of Immediate Access, pursuant to 42 U.S.C. § 9604(e)(5). Section 9604(e)(3), authorizes the EPA to enter any "property where entry is needed to determine the need for response or to effectuate a response action". 42 U.S.C. § 9604(e)(3). This authority of entry may be exercised "only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." 42 U.S.C. § 9604(e)(1). If an owner refuses the EPA's

request for entry onto the property, then the EPA may either issue an administrative order of access or seek a court order to compel compliance. 42 U.S.C. § 9604(e)(5); *U.S. v Mountaineering Refining Co.*, 886 F. Supp. 824, 827 (D.Wyo. 1995); *B.F. Goodrich Co. v Murtha*, 697 F. Supp. 89, 96-97 (D.Conn.1988), aff'd, *B.F. Goodrich v Murtha*, 958 F.2d 1192 (2d Cir.1992), *United States v Charles George Trucking*, 682 F. Supp. 1260, 1264-65 (D.Mass. 1988). 42 U.S.C. § 9604(e)(5) states in pertinent part:

(5) Compliance Orders.--

(A) Issuance.--If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) Compliance.--The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

42 U.S.C. § 9604(e)(5).

In the instant action, the only question before the Court is whether the government can prove the elements necessary under 42 U.S.C. § 9604(e)(5)(B). If the government cannot satisfy the statutory prerequisites, the Court cannot compel the City to comply with the EPA's UAO. As noted by several courts, the five statutory elements are: 1) the entry must be sought under paragraphs (2), (3) or (4) of § 9604(e); 2) the EPA must seek the property owner's consent before seeking court-ordered compliance; 3) the EPA must demonstrate that there is a "reasonable basis to believe" that there may be a release of a hazardous substance, pollutant, or contaminant from the site; 4) there must be some interference with the entry request before the court may order compliance; and 5) the demand for entry must not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. *Mountaineering*, 886 F. Supp. at 827-28(quoting *United States v. Northside Sanitary Landfill, Inc.*, 1988 U.S. Dist. LEXIS 16970, 1988 WL 147257, 18 ELR 20850, *20851 (S.D. Ind. 1988)).

The City only challenges the EPA's UAO and subsequent request for. court ordered access on three grounds (elements three, four, and five). Consequently, the Court must first determine whether the EPA has demonstrated that there is a "reasonable basis to believe" that there may be a release of a hazardous substance, pollutant, or contaminant from the Site. Second, the Court must determine whether the City has interfered with the EPA's entry request, and third, whether the demand for entry was arbitrary and capricious, an abuse of discretion, or otherwise in violation of law.

1) Reasonable Basis

In order to gain access to a place, property, or location or issue an access order, the EPA must demonstrate that there is a "reasonable basis to believe" there may a release or a threat of a release of a hazardous substance. 42 U.S.C. § 9604(e)(1); 42 U.S.C. § 9604(e)(5)(B). The City argues that the EPA has failed to show on the administrative record that a release or threat of a release from the City-owned property will occur.[3]The. City further argues that the potential for a release will actually be enhanced by the response action taken by the EPA. The City points to a study by the Agency for Toxic Substances and Disease Registry ("ATSDR") as well as a memorandum to the EPA following the May 1995 flood to support this contention.

Clearly, the pertinent question is whether the EPA has shown that there is a "reasonable basis to believe" that there may be a release at the Site. As the City has pointed out, there is some evidence that the EPA's response action could actually increase the potential for a release of CERCLA substances.[4]

---

[3] The Court summarily rejects the City's contention that the EPA must prove that there is a threat of release from the City's property. As noted by several courts, CERCLA does not make any "distinction between properties containing hazardous substances and those that are merely adjacent to such properties." The statute authorizes entry to any property for the purpose of effectuating a response action. *Mountaineering*, 886 F. Supp. at 828; *Charles George*, 682 F. Supp. at 1272; *New Jersey Department of Environmental Protection v. Briar Lake Development Corp.*, 736 F. Supp. 62, 66 (D.N.J. 1990).

[4] The Court does not express any opinion as to the merits of the EPA's response action, or for that matter, the merits of the City's position that the response action could enhance the release of toxic substances. The Court merely points out that the City has offered contradictory evidence of the correctness of the EPA's decision.

However, the Court's review is limited to whether the EPA's UAO is supported by the administrative record and not whether the EPA's decision is the correct one.

Upon examination of the administrative record, the Court concludes that the EPA's request for access and the subsequent issuance of the UAO is supported by the EPA's reasonable belief that there may be a release or a threat of a release of hazardous substances. During prior investigations and subsequent testing, which the City did not oppose, the EPA discovered that the soil at the Site contained a number of contaminants, including arsenic, lead and polynuclear aromatic hydrocarbons. (See UAO at paragraphs 11 & 12). Arsenic, lead and polynuclear aromatic hydrocarbons are hazardous substances under CERCLA. See 42 U.S.C. § 9601(14). As a result of the EPA's investigation, the Site was placed on the National Priorities List. Clearly, the EPA believes the removal action that it has proposed will "abate a release or a potential release" of the hazardous substances noted above, or at the very least prevent the public from having further contact with these hazardous substances. (See UAO at paragraphs 24 & 35). Consequently, based upon the clear existence of hazardous substances located at the site and the Site's inclusion in the National Priorities List, the Court concludes that the EPA has demonstrated that it has a "reasonable basis to believe that there may be a release or a threat of a release of hazardous substances" at the Site.[5]

---

[5] Based upon similar evidence, several courts have concluded likewise. *See Mountaineering*, 886 F. Supp. at 828 (court held that reasonableness of the EPA's request for access was "amply satisfied" by what an EPA manager smelled at the location and the fact that the property was included in the National Priorities List.); Northside Sanitary Landfill, 18 ELR at *20851(court held that even though the possible release of

2) Interference with the EPA's Access

In order to obtain court-ordered access, the City contends that the EPA must demonstrate that the City has done something that would interfere with the response action. The term "interference" is not defined in CERCLA. However, the court in Northside Sanitary Landfill concluded that the term "interference" should be "interpreted to mean conduct which could delay the cleanup schedule". *Northside Sanitary Landfill*, 18 ELR at 20851.[6] This Court believes that this definition is the proper definition to be applied under 42 U.S.C. § 9604(e)(5)(B). In the instant case, the City has clearly interfered with the EPA's attempt at cleaning up the Site. The City has attempted to "physically exclude"[7] the EPA from

---

hazardous substances was "minimal", the EPA had demonstrated that there was a reasonable basis to believe there could be a release at a future date.); In the Matter of Venus Laboratories, Inc., 1990 U.S. Dist. LEXIS 14372, 1990 WL 172583, (N.D.Ill. 1990)(court held that soil samples analyses from the defendant's property, concluding that there were hazardous substances, was "ample support" for the EPA's conclusion that there is a reasonable basis to believe that there may be a release or threat of a release at the defendant's facility); United States v. M. Genzale Plating, Inc., 723 F. Supp. 877, 887 (E.D. N.Y. 1989)(court concluded that the location's placement on the National Priorities List, combined with two tests substantiating the release CERCLA substances was sufficient to satisfy the EPA's burden of showing a "reasonable basis").

[6] The court defined the term based upon the "overarching purpose" of the statute, which is to provide quick remedial action in cleaning up hazardous waste sites. *See J.V. Peters & Co., Inc. v. Administrator*, EPA, 767 F.2d 263, 264 (6th Cir. 1985).

[7] The Court borrows this term from Northside Sanitary Landfill wherein the court examined several cases where the courts did not even discuss the issue of "interference" because, like the instant case, the defendants in *Charles George, United States v. Long*, 687 F. Supp. 343 (S.D.Ohio

their property. For example, on January 7, 1999, the City unequivocally denied access to the EPA via letter. In addition, the City also filed a complaint for a preliminary and permanent injunction to enjoin defendants from implementing continuing response efforts on the City's property at the Site, which was subsequently dismissed. Without question, the City has clearly engaged in conduct which has interfered with the EPA's response action.

3) Nature of the Demand for Entry

The City contends that the EPA's request for access and its issuance of the UAO to the City was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law". 42 U.S.C. § 9604(e)(5)(B)(i). The City further contends that the EPA's decision to allow other property owners at the Site to voluntarily grant or deny access but not allow the City the same right, constitutes an "arbitrary and capricious" decision by the EPA.[8] The EPA counters that

---

1987), and *United States v. Iron Mountain Mines, Inc.*, 1987 U.S. Dist. LEXIS 14969, 1987 WL 46792 (E.D.Cal. 1987) all "physically excluded" the government from their respective property.

[8] The City is correct in noting that the Action Memorandum does state that the "right of entry access from the owners and residents must be obtained in the form of a consensual access agreement". However, this does not mean that the request for access is voluntary, as the City has argued. The EPA would still have the option of filing an enforcement action under 42 U.S.C. § 9604(e)(5) against a party who does not consent. This is the exact purpose of 42 U.S.C. § 9604(e)(5), which is to enable the EPA to order access, then possibly request a court to compel compliance, when a party will not consent to access. The inclusion of the language "This written permission is given by me voluntarily with knowledge of my right to refuse and without threats or promises of any kind." in the "Consent for Access" agreements given to some property owners at the Site, does not translate into a conclusion

since they had a "reasonable basis to believe" that there may be a release of hazardous substances, and that in fact hazardous substances have been found at the Site, the decision to request entry onto the City's property and then issue a UAO demanding access cannot be said to be "arbitrary and capricious". The Court agrees. Clearly, the EPA has demonstrated that there are hazardous substances located at the Site and that the City's property is located at the Site. In fact, the EPA has demonstrated that the contamination is significantly higher in the undeveloped portions (which is where the City's property is located) of the Site than the developed areas. An examination of the. affidavits provided by the EPA, the Action Memorandum, and the UAO evidences that the EPA decision is reasonable, albeit possibly not the best solution to the problems at the Site. Consequently, the EPA's decision to issue the UAO directing the City to allow access to the City's property, for the purpose of undertaking remedial action, simply cannot be viewed as "arbitrary and

---

that the EPA has stated that the access requested is "voluntary". This language merely notes the that the party is entering into the agreement voluntarily. The fact that the EPA notified the individuals but not the governmental entities that they had the right to refuse does not mean the entire process was "arbitrary and capricious", and certainly does not signify that the EPA is treating the City differently. The Court does not want to guess at the EPA's reasons for doing so, since they are not truly pertinent, but it is possible that the EPA knows that individuals may not be aware of their right to refuse access, which they do have under the CERCLA statute, whereas a governmental entity is more likely to be aware of their rights or be able to hire legal assistance to inform them of their right to deny access to the property. However, even if the party exercises this right of denial, the EPA could later bring an action under 42 U.S.C. § 9604(e)(5).

capricious, an abuse of discretion, or otherwise not in accordance with law."[9]

Based upon the "undemanding standard"[10] set forth in 42 U.S.C. § 9604(e)(5)(B) and noted above, the Court concludes the EPA's Motion for Order in Aid of Immediate Access should be granted.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the Motion for Order in Aid of Immediate Access of the United States of America, on behalf of the U.S. Environmental Protection Agency, be and is hereby **GRANTED.**

IT IS FURTHER ORDERED that the Environmental Protection Agency, its officers, employees, or representatives may enter upon, move about, and remain on or about the property owned by the City of New Orleans, which is part of the Agricultural Street Superfund Site in New Orleans, for the purpose of taking a response action under CERCLA.

IT IS FURTHER ORDERED that the City of New Orleans is enjoined from obstructing, impeding, or otherwise

---

[9] In the instant case, the EPA followed the proper procedures under CERCLA. The EPA requested the City to consent to access several times, but the City refused. The EPA then issued a UAO under 42 U.S.C. § 9604(e)(5)(A) ordering the City to allow access. After the City continued to refuse access and filed a complaint for injunction against the EPA, the EPA filed the instant enforcement action under 42 U.S.C. § 9604(e)(5)(B).

[10] It was noted by the court in *Mountaineering*, 886 F. Supp. at 829 and by the court in *United State v. Fisher*, 864 F.2d 434, 438 (7th Cir. 1988) that the government's burden under U.S.C. § 9604(e)(5)(B)is an "undemanding standard".

interfering with the entry and access by EPA, its officers, employees, or representatives.

IT IS FURTHER ORDERED that this Order for access and injunctive relief shall terminate on the date on which all the tasks related to the remedial investigation/feasibility study, remedial design and remedial action are completed.

New Orleans, Louisiana, April 1, 1999.

/s/MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX C

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	¶	
City of New Orleans	¶	
New Orleans, Louisiana	¶	ADMINISTRATIVE ORDER
REGARDING THE	¶	U.S. EPA DOCKET NO. CERCLA 6-10-99
	¶	
Agriculture Street Landfill Site	¶	
New Orleans, Orleans Parish, Louisiana	¶	

UNILATERAL ADMINISTRATIVE ORDER FOR ACCESS

I. JURISDICTION

1. This Administrative Order ("Order") is issued to the City of New Orleans ("Respondent"), pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (42 U.S.C. § 9601 et seq.) as amended by the Superfund Amendments and Reauthorization Act of 1986, Publ. L. 99-499, 100 Stat. 1613 (1986) ("CERCLA"), 42 U.S.C. § 9604 (e) (5).

2. Authority to issue orders pursuant to Section 104 of CERCLA was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2923. This authority was further delegated to EPA Regional Administrators on May 11, 1994 by EPA Delegation No. 14-6, and redelegated to the Director of the Superfund Division by Regional Delegation No. 6-14-6 on August 4, 1995.

3. This Order directs Respondent to comply with EPA's request for access to Respondent's property located on Operable Unit No. 1 ("OU1" or "undeveloped property") of the Agriculture Street Landfill Superfund Site ("Site"). This Order requires Respondent to allow EPA to enter property owned by Respondent and described in Attachment A of this Order, in order to effectuate an environmental response action pursuant to CERCLA.

4. The subject environmental response action is a non-time-critical removal action ""removal action") which is necessary to abate a release or substantial threat of release of hazardous substances to the environment. EPA authorized the removal action, more completely described in Paragraph 20 below, in an Action Memorandum signed on Sept. 2, 1997. The removal action is being conducted pursuant to EPA authority under CERCLA Section 104(a), 42 U.S.C. §9604(a).

II. FINDINGS OF FACT

Based upon information available on the date of issuance of this Order, the Director of the Superfund

Division, United States Environmental Protection Agency, Region 6, makes the following Findingss of Fact:

5. The Agriculture Street Landfill Superfund Site is the location of a former landfill which was operated by Respondent from approximately 1909 through the mid-1960s. The Site covers approximately 95 acres. The landfill received, inter alia, household trash, construction and hurricane debris, and ash from municipal waste incinerators.

6. The Site was located in Orleans Parish approximately 2.5 to 3 miles north-northeast of the central business district of New Orleans. The Site is bound on the north by Higgins Boulevard, and on the south and west by the Southern Railroad rights of way. The eastern site boundary extends from the cul-de-sac at the southern end of Clouet Street, near the railroad tracks, to Higgins Boulevard between Press and Montegut Streets. The site is partially developed.

7. Currently, the Site is divided into two usage areas. Approximately half of the old landfill area is occupied by private, single-family residences, the Housing Authority of New Orleans (HANO) Townhouse development, the Shirley Jefferson Community Center, a small commercial complex, the Gordon Plaza Apartments, Magrauer Playground, the Moton Elementary School. The remaining portion is undeveloped and, prior to commencement of the response action in October, 1998, was heavily overgrown with vegetation and trees.

8. Respondent owns property located within the undeveloped property. A description of the specific property under the ownership of Respondent as well as

the supporting deed and title records are provided in Attachment A.

9. Individual tracts of land within the undeveloped property are owned by approximately six different landowners. Except for Respondent and one other landowner, all undeveloped property owners have granted access to EPA to conduct the removal action on their property. Access to this property by the general public is now limited by a fence.

10. EPA divided the Site into five operable units for purposes of investigation and response action. As noted above, Operable Unit 1 is the undeveloped property. Operable Unit 2 includes the residential developments: Gordon Plaza Apartments, Press Park Townhomes, and the Gordon Plaza Subdivision. Operable Unit 3 is the Shirley Jefferson Community Center and associated playground area. Operable Unit 4 is the Moton Elementary School, including the Magrauer Playground and recreation center. Operable Unit 5 is the groundwater.

11. EPA completed a Remedial/Removal Integrated Investigation ("RR/II") in March, 1995. The RR/II revealed a number of contaminants in surface and subsurface soil.

12. In the Human Health Risk Assessment (Appendix S to the RRII Report), lead, arsenic and polynuclear aromatic hydrocarbons (PAHs) were identified as contaminants of potential concern (COPCs) in surface and subsurface soil.

13. Lead, arsenic, and PAHs are hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 960 (14) and 40 C.F.R. § 302.4.

14. Site characterization data compiled in the RR/II Report identified the potential for direct and indirect contact, ingestion, and inhalation of soil and waste contaminated with COPCs by human and ecological receptors at concentrations which could pose unacceptable risks.

15. In November, 1995, EPA completed an Engineering Evaluation and Cost Analysis ("EE/CA") for the Site. The EE/CA was made available for comment on April 17, 1996.

16. One February 28, 1997, a Proposed Plan of Action was released for public comment. Comments were accepted from March 5, 1997 through May 12, 1997.

17. Review of public comments revealed objections to leaving the undeveloped property fenced, without further response action. EPA provided an additional opportunity to comment on alternatives for OU1 between July 7 and August 5, 1997.

18. In September, 1997, EPA issued an Action Memorandum authorizing a non-time-critical removal action for Operable Unites 1, 2, and 3.

19. In September, 1997, EPA issued a Record of Decisions selecting no further action for Motor School (OU4) and the Groundwater Operable Unit (OU5). Investigations conducted by EPA subsequent to placing the Site on the National Priorities List (NPL) indicate that no additional response actions are required to ensure

protection of human health and the environment at Operable Unites 4 and 5.

20. Components of the removal action for OU1 are to clear the property of vegetation, place a geotextile filter fabric on the subgrade, cap it with 12 inches of clean soil, grade and compact the clean fill, and re-vegetate the surface.

21. Components of the removal action for Operable Units 2 and 3, the residential area and Community Center, are to excavate the top 24 inches of existing soil/waste material and transport it off-site for disposal. Permeable geotextile filter fabric will be placed on the subgrade, covered with clean fill, and rellandscaped. Surface features will be replaced or returned as nearly as possible to "as was" condition.

22. Field work on all operable units is expected to conclude within 12-18 months from its inception.

23. In October, 1998, EPA initiated the non-time-critical removal action at the Gordon Plaza Apartments and on portions of the undeveloped property for which access had been granted by the property owner.

24. The removal action will abate a release or a potential release of the identified hazardous substances into the environment. Such a release could adversely impact human health through inhalation, ingestion, or dermal contact.

25. EPA requires access to the Respondent's property to conduct a removal action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), on the Site as described in the 1997 Action Memorandum.

26. Respondent is a municipality located in the state of Louisiana.

27. In conformity with agency policy, EPA sought to obtain voluntary access to Respondent's property. By letter dated November 12, 1997, EPA notified Respondent that access to the property was needed in order to conduct a CERCLA non-time-critical removal action. The letter provided Respondent with a standard EPAAA access agreement relating to the property owned by the Respondent and requested that the Respondent sign and return the agreement. Respondent did not sign the agreement. Correspondence related to site access is provided at Attachment B.

28. One Oct. 19, 1998, at the beginning of field work on this response action EPA technical and legal staff met with representatives of the City and the Housing Authority of New Orleans to discuss the governmental entities' permission to conduct the response action on property owned by them and found within the Site boundaries, among other issues.

29. On November 19, 1998, Mr. Lon Biasco, On-Scene Coordinator for EPA, discussed the matter of access by teleconference with Jerald L. White, Mayor's Office of Environmental Affairs. A second copy of the standard EPA access agreement for City property on the Site was faxed to Mr. White on that date.

30. By letter of December 23, 1998, EPA again wrote to Respondent soliciting access. A copy of the December 23 letter and an access agreement with a complete property description attached was sent to city officials by Federal Express on January 4, 1999.

31. By letter dated January 7, 1999, Respondent unequivocally denied access to EPA to conduct the response action.

III. CONCLUSIONS OF LAW

Based upon information available on the date of issuance of this Order, the Director of the Superfund Division of EPA Region 6 makes the following Conclusions of Law:

32. Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), provides unconditional authority for EPA, its officers, employees, agents and representatives, including designated contractors and state personnel, to enter property at all reasonable times to determine the need for response, or choosing or taking response actions at a site, upon a reasonable belief that there is a release or threat of release of a hazardous substance at the facility.

33. The Agriculture Street Landfill Superfund Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

34. "Hazardous Substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and listed in Paragraph 13 above, have been found in surface and subsurface soil samples at the Site.

35. The presence of the hazardous substances identified in Paragraph 13 in the surface and subsurface soils provides EPA with a reasonable basis to believe that a "release", as that term is defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or threat of release of hazardous substances to the environment may occur at the Site.

36. Access to the property under the ownership or control of Respondent is for the purpose of performing a removal action as defined in Sections 101(23) and 104(a) CERCLA, 42 U.S.C. §§ 9601(23) and 9604(a). Access is needed for the purpose of "taking" or "effectuating" a response action within the meaning of CERCLA §§ 104(e)(1) and 104(e)(3)(D).

37. Respondent is a "person" as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Respondent grant EPA access, pursuant to Section 104(e) of CERCLA, 42 U.S.C. 9604(e), to the area defined in Attachment A, below, for the purpose of conduction the removal action described in the September 2, 1997 Action Memorandum for the Agriculture Street Landfill Site.

38. The activities to be undertaken at this portion of the Site during the Removal Action include, but are not limited to:

- Surveying and documenting, by photographs and/or videotape, the condition of the Property (including the inside of any structure on the Property) both before and after removal work being done on the Property;
- Staging of equipment and materials for construction of the response action to the entire Site;
- Use and temporary storage of heavy equipment (e.g., bulldozers, backhoes, cranes, etc.) on the property for the duration of the entire Project and for use on the entire Site;

- Temporary installation of Site support facilities, including field offices, utility poles and lines, storage sheds, access roads, staging and loading areas, and other facilities as necessary;
- Implementation of rodent control measures;
- Removal of brush, trees, vegetation, trash, and debris as deemed necessary and/or expedient, in the sole discretion of the Government, for remediation to the Property and as required for aid and support to the entire Project and Site restoration;
- Clearing, grubbing, grading, trenching, and recontouring the Property to Facilitate drainage, storm water management, and erosion control;
- Excavation, as necessary, and consolidation of contaminated soil, including the temporary storage of excavated contaminated soil from the entire Site, which contaminated soil will be removed prior to termination of the response action;
- Stockpiling and storing clean soil for capping and backfill for the entire Site;
- Placement of geotextile membrane over the graded area;
- Placement of clean backfill over geotextile membrane;
- Grading and seeding of cleared area; replanting small trees;
- Installation of air monitoring equipment and other safety features during construction and post-construction activities;
- Patrolling, policing, and fencing the Property, in the Government's sole discretion, to prevent unauthorized

access to the Property and to protect Government equipment;

- Removal of all temporary facilities and materials from the Property at the conclusion of the response action to the Site;
- Such other actions as the Government and/or the EPA On-Scene Coordinator determines necessary to protect human health or welfare or the environment in connection with the subject removal action.

39. EPA and its response action contractors shall be granted access for the time necessary to complete the non-time-critical removal action set forth in the Sept. 2, 1997 Action Memorandum, together with any additional work PEA determines to be necessary to abate a release or threat of release of a hazardous substance at the Site.

40. Respondent shall not interfere with EPA's exercise of its access authorities pursuant to Section 104(e)(3) of CERCLA, 42 U.S.C. §9604(e)(3) and 40 C.F.R. §300.400(d), and shall not interfere with or otherwise limit any activity conducted at the Site pursuant to this Order by EPA, its officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this Order.

41. Respondent shall indicate whether it intends to comply with this Order in writing on or before March 8, 1999. Notice of Intent to Comply shall be directed to ms. Ursula Lennox, (6SF-LP), U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202. Failure to give notice shall be construed to constitute non-compliance.

42. This Administrative Order shall be binding on all employees, agents, successors and assigns of Respondent. In the event of any conveyance by Respondents of an ownership or control interest in the property which is the subject of this Order, Respondent shall convey the interest so as to ensure continued access by EPA or its representatives for the purposes of carrying out all activities pursuant to this Order. Respondent shall notify EPA in writing at least thirty (30) days before any conveyance of an interest in the property which is the subject of this Order, and shall notify the other parties involved in the conveyance of the provisions of this Order prior to the transfer.

V. RESERVATION OF RIGHTS

43. Nothing herein limits or otherwise affects any right of the United States to gain entry to property under the ownership or control of any person pursuant to applicable laws, regulations or permits.

44. Nothing herein is intended to release any claims, causes of action or demands in law or equity against any person, state, firm, partnership, or corporation for any liability it may have to the United States, or any other person, state, firm, partnership, corporation or association arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, solid wastes, pollutants, or contaminants found at, taken to, or taken from the site.

45. This Order does not constitute any decision on pre-authorization of funds under Section 111(a)(2) of CERCLA< 42 U.S.C. §9611(a)(2).

VI. LIABILITY OF THE EPA

46. Nothing herein is intended to be an assumption by EPA of liability for any claims or causes of action arising from, or on account of, Respondent's acts or omissions or acts or omissions of those under Respondent's control arising in connection with the carrying out of activities pursuant to this Order.

VII. ADMINISTRATIVE RECORD

47. EPA has established an Administrative Record which forms the basis for the issuance of this Order. It is available for review by appointment on weekdays during regular business hours at the following information repositories for the Site: 1) USEPA Community Outreach Office, 3221 Press Street, New Orleans, La. 70126 (504) 944-6445 and 2) USEPA Region 6, 1445 Ross Ave., 7th Floor, Dallas, Texas 75202 (214) 665-6548.

VIII. EFFECTIVE DATE - OPPORTUNITY TO CONFER

48. Respondent may consult with EPA regarding the terms of this Order on or before March 5, 1999. Respondent may appear in person and/or by attorney or other representatives for the purpose of presenting any objections, defenses or contentions which the Respondent may have regarding this Order. If Respondent desires such a consultation, please contact Pamela J. Travis, Senior Attorney, at (214) 665-8056. Respondent may make an oral request for a conference. Any such consultation between Respondent and EPA

does not affect any of the times set forth for compliance in this Order.

49. This Order is effective upon receipt.

VII. PENALTIES FOR NONCOMPLIANCE

50. Respondent is hereby advised that any action taken by Respondent to deny access to EPA for the purpose of conducting the Removal Action, or any attempt to interfere with the actions described in Paragraph 38 of Section IV of this Order, shall be deemed a violation of this Order and subject to the penalties of $27,500 per day per violation established at Section 104 (e)(5)(B) of CERCLA, 42 U.S.C. § 9604(e)(5)(B), and/or punitive damages in an amount up to three times the amount of any costs incurred by the United States as a result of such failure, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. §9607(c)(3).

/s/ 2/24/99

Myron O. Knudson, Director
Superfund Division (6SF)
Region 6
United States Environmental Protection Agency

Date

APPENDIX D

U.S. Department of Justice
Environment and Natural Resources Division

Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

Telephone (202) 514-1032
Facsimile (202) 514-8395

February 25, 2000

The Honorable Marcel Livaudais, Jr.
Judge
United States District Court
Eastern District of Louisiana
500 Camp Street 70130
New Orleans, Louisiana

February 25, 2000

Re: United States v. City of New Orleans; Civil Action No. 99-0893

Dear Judge Livaudais:

On February 9, 2000, the Court of Appeals, in an unpublished decision, affirmed your decision in this case. The United States expected the Court of Appeals to issue a full, published decision on this matter, but instead that Court referenced your decision and affirmed it. Since your decision also was unpublished, there is no published decision in any district court in the Fifth Circuit that explains the law pertaining to the United States' right to access property at a Superfund Site when an owner denies access.

Your April 1, 1999, decision fully and fairly described the elements that the United States must satisfy in order to obtain access. I believe both the United States and property owners at Superfund sites would benefit from the publication of this decision because it provides clear guidance for parties with similar circumstances. Therefore, the United States would appreciate it if you would authorize the publication of your decision.

Thank you for your consideration of this matter.

Sincerely,
/s/
Elizabeth A. Edmonds
Trial Attorney

cc: Pam Travis
Laurie Barcelona
Daria Diaz

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

(2)

No. 99-1805

In the Supreme Court of the United States

CITY OF NEW ORLEANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
RONALD M. SPRITZER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

16 pp

QUESTION PRESENTED

Whether the Environmental Protection Agency's order, which required that the agency be given access to contaminated property owned by the City of New Orleans so that the agency could complete an environmental cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, was arbitrary and capricious.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bell Petroleum Servs., Inc., In re, 3 F.3d 889 (5th Cir. 1993)	2
Boarhead Corp. v. *Erickson*, 923 F.3d 1011 (3d Cir. 1991)	2
Colorado v. *Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991)	2
New York v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)	2
United States v. *Bestfoods*, 524 U.S. 51 (1998)	2

Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*	1-2
§ 104(e), 42 U.S.C. 9604(e)	2
§ 104(e)(1), 42 U.S.C. 9604(e)(1)	2
§ 104(e)(3)(d), 42 U.S.C. 9604(e)(3)(d)	2
§ 104(e)(5), 42 U.S.C. 9604(e)(5)	8, 10
§ 104(e)(5)(A), 42 U.S.C. 9604(e)(5)(A)	3
§ 104(e)(5)(B), 42 U.S.C. 9604(e)(5)(B)	3
§ 104(e)(5)(B)(i), 42 U.S.C. 9604(e)(5)(B)(i)	3
§ 105(a), 42 U.S.C. 9605(a)	4
§ 106(a), 42 U.S.C. 9606(a)	3
§ 107(a), 42 U.S.C. 9607(a)	3
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 2, 100 Stat. 1614	2

Miscellaneous: Page

59 Fed. Reg. 65,206 (1994) 4

In the Supreme Court of the United States

No. 99-1805

CITY OF NEW ORLEANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is unreported. The opinion of the district court (Pet. App. B2-B13) is reported at 86 F. Supp. 2d 580.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2000. The petition for a writ of certiorari was filed on May 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The dispute in this case arises from the efforts of the Environmental Protection Agency (EPA) to obtain access to property belonging to petitioner, the City of New Orleans, to complete a cleanup of hazardous substances pursuant to the Comprehensive Environmental

Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*

1. Congress enacted CERCLA in response to widespread concern over the severe environmental and public health effects of the improper disposal of hazardous wastes. See *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 2, 100 Stat. 1614, CERCLA established a comprehensive statutory scheme to address and accomplish the cleanup of actual or threatened releases of hazardous substances. See *Colorado* v. *Idarado Mining Co.*, 916 F.2d 1486, 1488 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

CERCLA's purpose "is to facilitate the prompt cleanup of hazardous waste sites." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 894 (5th Cir. 1993). To that end, CERCLA provides EPA with "the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up." *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991). Among other things, Section 104(e) of CERCLA, 42 U.S.C. 9604(e), accords EPA a statutory right of access to potentially contaminated property, and a right to gather information about such property, subject to certain limits and procedures.

Under Section 104(e), EPA and its representatives may enter property, at reasonable times, if EPA determines that "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." 42 U.S.C. 9604(e)(1) and (3)(d). If a party will not consent to access, EPA may issue an administrative order directing

that party to provide access. 42 U.S.C. 9604(e)(5)(A). If the party to whom the order is directed fails to comply, the United States may bring an action in federal district court to compel compliance. 42 U.S.C. 9604(e)(5)(B).

When deciding whether to compel compliance with an EPA access order, a district court first must determine if "there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant." 42 U.S.C. 9604(e)(5)(B). If the answer to that question is "yes," the district court is directed to prohibit any interference with EPA's entry onto or inspection of the property, "unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 9604(e)(5)(B)(i).

2. Between 1909 and the 1960s, petitioner operated a landfill in New Orleans, Louisiana, in the area now designated as the Agriculture Street Landfill Superfund Site (the Site).[1] Pet. App. C16. During the landfill's many years of operation, ash from municipal waste incinerators, hurricane and construction debris, and household trash were deposited there. *Ibid.* Beginning in the 1970s, approximately half of the 95 acres of the Site were developed for private and public uses, including private single-family homes, multiple-family private

---

[1] Because of its operation of the landfill, petitioner is one of the parties responsible for the cleanup of the Site. See 42 U.S.C. 9607(a). EPA may order potentially responsible parties to perform the cleanup of the Site if certain conditions are satisfied, or seek a court order to compel those parties to do so. 42 U.S.C. 9606(a). Here, EPA has undertaken the cleanup activities itself, subject to its right (under 42 U.S.C. 9607(a)) to seek recovery of its costs from liable parties.

and public housing units, a community center, a recreation center, retail businesses, an elementary school, and an electrical substation. *Ibid.* About half of the site is still undeveloped. *Ibid.* The land owned by petitioner is located in the undeveloped part of the Site. *Ibid.*

EPA's investigations at the Site disclosed heavy metals, such as lead, and organic compounds, such as polynuclear aromatic hydrocarbons (PAHs), in the surface and subsurface soils at the Site. Pet. App. B8. On December 16, 1994, the Site was added to the National Priorities List (NPL), a list of the contaminated sites with the highest priority for investigation and response. See 42 U.S.C. 9605(a); 59 Fed. Reg. 65,206 (1994). In 1995, EPA performed a Human Health Risk Assessment at the Site. Pet. App. C17. As petitioner concedes (Pet. 3), the highest concentrations of hazardous substances (including lead, arsenic and PAHs) were found in the soil of the undeveloped portion of the Site. Pet. App. B11; C.A. R.E. 76-78 (contour maps).

Before the current dispute arose, EPA undertook several response actions to address contamination at the Site. Pet. App. B3. Petitioner did not oppose any of those actions. *Id.* at B3 n.2.[2] Among other things, EPA divided the Site into five operable units (OUs) based on the distinct conditions and problems in the different parts of the Site. OU 1 is the 48-acre section of undeveloped property, including petitioner's property; OU 2 includes all of the residential developments and a small commercial area; OU 3 includes the Community Center; OU 4 is the Moton Elementary School, Magrauer Play-

---

[2] As petitioner acknowledged in the court of appeals, before 1999, petitioner had "fully cooperated with the EPA * * * by allowing the EPA access for unlimited investigation and testing on its property." Pet. C.A. Br. 3.

ground and recreation center; and OU 5 is the groundwater at the Site. Pet. App. C17.

In September 1997, after investigating the extent of the contamination in each OU, EPA issued an Action Memorandum for OUs 1-3 and a no-action Record of Decision for OUs 4 and 5. Pet. App. C18-C19. EPA's Action Memorandum authorized a "removal action" for OUs 1-3. *Id.* at C18. The removal action for OU 1 consisted of a sequence of actions—including clearing the property of vegetation, placing a geotextile filter fabric on the subgrade, and covering the surface with fresh soil and new vegetation—to address the continuing risk posed by the contamination in the area. *Id.* at C19.

Beginning in November 1997 and continuing for approximately one year after that date, EPA asked property owners in the undeveloped area (OU 1), including petitioner, to consent to EPA access to their property. Pet. App. B3-B4. EPA's efforts to obtain voluntary agreements regarding access reflected the agency's normal policy of seeking such agreements before exercising the agency's authority to compel access. *Id.* at C20. On December 23, 1998, after more than one year of unsuccessful efforts to obtain petitioner's voluntary consent, EPA again wrote petitioner, explaining that access to petitioner's properties in the undeveloped portion of the Site was needed in order to complete the cleanup of the undeveloped area, and that the agency had statutory authority to compel access. *Id.* at B4. By letter dated January 7, 1999, petitioner unequivocally declined to give EPA access to its property. *Ibid.*

Petitioner is the sole landowner from the undeveloped area (OU 1) that refused to grant EPA access

voluntarily.[3] The primary reason petitioner gave for its refusal, however, had nothing to do with what EPA proposed to do on petitioner's land. Instead, petitioner's refusal stemmed from petitioner's desire that EPA provide new housing to any resident of the residential area who wished to be relocated; petitioner called that proposed government-financed relocation plan a "community buy-out." C.A. R.E. 44-45. EPA, in response to petitioner's demands, explained that it "does not have authority to conduct a permanent relocation at this site, and EPA is now conducting the environmental response action which will be fully protective of human health and the environment." *Id.* at 42. Petitioner, however, altered neither its demands nor its refusal to grant EPA access to its property. Having failed to obtain petitioner's voluntary consent, on February 24, 1999, EPA exercised its statutory authority to issue a unilateral administrative order requiring petitioner to provide access. Pet. App. C14-C27. Petitioner, however, declined to comply with the order. *Id.* at B4.

3. Following petitioner's refusal to comply, the United States filed this action, on March 19, 1999, in the United States District Court for the Eastern District of Louisiana, seeking enforcement of EPA's order. C.A. R.E. 1. On April 1, 1999, the district court granted the United States' Motion for Order in Aid of Immediate Access and ordered petitioner to provide EPA access to its property. Pet. App. B2-B13.

The district court first explained that, in general, district courts will enforce EPA unilateral administra-

---

[3] EPA's access order stated that petitioner and one other owner in the undeveloped area had refused access. Pet. App. C17. However, the other landowner subsequently gave consent.

tive orders requiring access to property under CERCLA where "five statutory elements" have been met. Pet. App. B6. Those "elements," the court explained, are as follows:

> 1) the entry must be sought under paragraphs (2), (3) or (4) of § 9604(e); 2) the EPA must seek the property owner's consent before seeking court-ordered compliance; 3) the EPA must demonstrate that there is "a reasonable basis to believe" that there may be a release of a hazardous substance, pollutant, or contaminant from the site; 4) there must be some interference with the entry request before the court may order compliance; and 5) the demand for entry must not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law.

Ibid. (citations omitted).

In this case, petitioner claimed only that the latter-most three elements had not been met, *i.e.*, petitioner disputed whether there was a reasonable basis to believe that there may be a release of a hazardous substance, whether petitioner had interfered with EPA's entry onto the property, and whether the demand for entry was arbitrary, capricious, or an abuse of discretion. Pet. App. B6. With respect to the first disputed "element," the court found that EPA had a reasonable basis to believe that there may be a release of a hazardous substance from the Site "based upon the clear existence of hazardous substances located at the site and the Site's inclusion in the National Priorities List." *Id.* at B8. With respect to the second issue, the court found that petitioner had engaged in conduct that had interfered with EPA's response action. Petitioner had "unequivocally denied access to the EPA via letter"

and had "filed a complaint for a preliminary and permanent injunction to enjoin [EPA] from implementing continuing response efforts on [petitioner's] property." *Id.* at B10.

Finally, the court rejected petitioner's claim that EPA's demand for access was arbitrary and capricious. Petitioner's primary claim was one of unequal treatment. EPA, petitioner argued, had made the removal action voluntary for property owners in the developed area, but had issued an access order to petitioner, a property owner in the undeveloped area. Pet. App. B10. The district court first rejected petitioner's factual argument that EPA had designated the removal action as entirely voluntary. *Id.* at B10 n.8. Although EPA had indicated to property owners that their decision to sign a consent to access agreement was voluntary, the district court recognized that, by so doing, EPA had not renounced all use of its enforcement authority. To the contrary, even after seeking consent from landowners, "EPA would still have the option of filing an enforcement action under 42 U.S.C. 9604(e)(5) against a party who [did] not consent." *Ibid.*

The district court also noted that there was a significant difference between petitioner's property, which was undeveloped, and the developed property. "EPA has demonstrated," the district court explained, "that the contamination is significantly higher in the undeveloped portions (which is where [petitioner's] property is located) of the Site than the developed areas." Pet. App. B11. Furthermore, the court continued, "examination of the affidavits provided by the EPA, the Action Memorandum and [EPA's access order] evidences that the EPA decision is reasonable." *Ibid.* Having concluded that EPA had met all of the requirements of 42 U.S.C. 9604(e)(5), the court ordered

petitioner to provide EPA with immediate access to the property, and it enjoined petitioner from interfering with EPA's remediation efforts. Pet. App. B12-B13.

The court of appeals affirmed in a one-page, unpublished opinion, adopting the reasoning of the district court. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 6) that the district court did not properly evaluate one of the relevant statutory factors under CERCLA—whether EPA's demand for access to petitioner's property was arbitrary and capricious—before ordering petitioner to grant EPA access to its property. That contention is factbound and without merit. Accordingly, no further review is warranted.

1. Petitioner does not claim that the district court articulated an incorrect legal standard. To the contrary, quoting the district court's decision, petitioner agrees that an order compelling compliance with an EPA access order under CERCLA is appropriate where the "five prerequisites" listed by the district court are met. Pet. 5 (quoting Pet. App. B6). See also p. 7, *supra*. Petitioner instead contends that the courts below misapplied one of the five "prerequisites," namely the requirement that EPA's demand for entry not be arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. Pet. 5-6. The misapplication of settled law to particular facts, however, rarely warrants this Court's review. In any event, the courts below properly evaluated and rejected petitioner's claim.

Petitioner's primary claim of arbitrariness before the district court stemmed from its contention that EPA had made the removal action voluntary for property

owners in the developed part of the Site, but had issued an access order to petitioner. Pet. App. B10. As the district court pointed out (*ibid.*), the factual premise of that argument—that EPA had designated the removal action as voluntary—is simply incorrect. The fact that EPA told property owners that their decision to sign a consent to access agreement was voluntary, the court explained, in no way precluded EPA from using its enforcement authority with respect to any property owners who did not consent. *Id.* at B10-B11 & n.8. To the contrary, even after seeking consent from landowners, "EPA would still have the option of filing an enforcement action under 42 U.S.C. 9604(e)(5) against a party who [did] not consent." *Id.* at B10 n.8.

2. Petitioner also appears to argue (Pet. 5-6) that the district court erroneously merged two distinct inquiries. In particular, petitioner characterizes the district court's opinion as holding that whenever there is a reasonable basis to believe a release of hazardous materials is threatened, EPA's demand for access to the property cannot be arbitrary or capricious. Petitioner misinterprets the district court's opinion. To be sure, the court sensibly noted that the threatened release of hazardous substances from petitioner's property supported EPA's desire for access. Pet. App. B10-B11. But the court did not end its analysis there. EPA's decision to obtain access, the court also explained, was supported by the fact that the highest concentrations of the primary contaminants were found in the undeveloped area (OU 1), where petitioner's property is located. *Id.* at B11. Moreover, while petitioner claims to have been singled out for differential treatment, every owner of undeveloped property in the Site *except* petitioner voluntarily agreed to provide EPA access for remediation purposes. See pp. 5-6 & note 3, *supra*. The fact that peti-

tioner was the only owner of undeveloped property—the most contaminated property—that declined to provide voluntary access explains why petitioner was also the only owner subjected to an EPA order requiring it to provide access.

In any event, the district court also specifically examined EPA's rationale for demanding access to petitioner's property—including "the affidavits provided by the EPA, the Action Memorandum and [EPA's access order]"—and concluded that EPA's decision was "reasonable." Pet. App. B11. Petitioner offers no reason to question that conclusion, which is amply supported by the record. In its Action Memorandum, EPA determined that grading the undeveloped area, including petitioner's land, was necessary to control run-off and to minimize storm water impacts to the developed area. C.A. R.E. 69. Indeed, EPA found that the topography of petitioner's property affected EPA's ability to grade a substantial portion of the lower section of the undeveloped area. Supp. C.A. R.E. 15. As a result, optimal measures to alleviate future flooding in the community could not have been implemented absent access to petitioner's property. *Ibid.*[4] Thus, as the courts below properly concluded, EPA's decision to require access to petitioner's property was wholly reasonable, and not arbitrary or capricious.

---

[4] Although the removal action could in theory be conducted on properties adjacent to those owned by petitioner without remediating petitioner's property, EPA concluded that doing so would substantially increase the time and cost of the response action. Additionally, remediation of alternating parcels of land would create differences in elevation, which could create drainage problems. C.A. R.E. 47.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
RONALD M. SPRITZER
Attorney

JULY 2000